In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1333

THE GENERAL TIRE AND RUBBER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. 1381, *et seq.)* for the purpose of reducing traffic accidents and resulting deaths and injuries. The Act directs the Secretary of Transportation to establish appropriate federal motor vehicle safety standards for motor vehicles and motor vehicle equipment (15 U.S.C. 1392(a)) and prohibits any person from manufacturing for sale, selling, offering for sale, or introducing or delivering for introduction in interstate commerce, any motor vehicle or motor vehicle equipment which fails to comply with an applicable federal safety standard. 15 U.S.C. 1397(a)(1).[1] The Act also provides that regulated persons must issue a cer-

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[1]The applicability of Section 1397(a)(1) is limited by 15 U.S.C. 1397(b)(1) to first purchases of motor vehicles and motor vehicle equipment in good faith for purposes other than resale.

tificate that the vehicle or item of motor vehicle equipment conforms to all applicable federal safety standards. 15 U.S.C. 1397(a)(3) and 1403.

Pursuant to 15 U.S.C. 1392(a), the Secretary promulgated Standard 109 (49 C.F.R. 571.109), which is involved here. That Standard establishes, *inter alia,* certain physical and performance requirements for [redacted] all new pneumatic tires for use on passenger cars manufactured after 1948, prescribes specific testing procedures for determining compliance with these criteria, and mandates certain labeling requirements for certifying that compliance.

Petitioner, a manufacturer and seller of tires subject to the Safety Act and Standard 109, has engaged in the practice of "microsiping" its tires. Microsiping is a procedure in which transverse grooves are cut into the tread of a tire at an angle to the tread.

In 1968 the National Highway Traffic Safety Administration ("NHTSA") in the Department of Transportation ("DOT"), as part of its enforcement responsibilities under the Act (see 49 C.F.R. 501.2(a)), determined that it was necessary to test microsiped tires for conformity with Standard 109. Accordingly, NHTSA arranged by telephone to purchase eight of petitioner's microsiped tires from one of its wholly-owned dealerships. An NHTSA representative then delivered the government's purchase order[2] to petitioner's store and approved eight tires for microsiping after verifying that the

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[2]The government's purchase order specified the trade name, size and price of the tires, and the price of the microsiping, and indicated that each tire must contain the DOT label indicating it was certified as conforming to all applicable federal safety standards.

tires conformed to the specifications of the purchase order. The tires were then microsiped by petitioner at its retail store (but not retested or recertified by petitioner to ensure conformity with Standard 109 after microsiping) and were shipped to an independent laboratory under contract with the government for testing. Subsequently, the government received an itemized invoice from petitioner containing a single charge covering the entire transaction.

When the tests showed that several of the microsiped tires failed to meet some of the requirements of Standard 109, the United States brought this enforcement action seeking injunctive and declaratory relief under 15 U.S.C. 1398 and 1399 against petitioner for manufacturing, selling and certifying microsiped tires which did not comply with Standard 109. Petitioner admitted that these eight tires violated the Standard but contended that it was not applicable to the transaction in question. The district court determined that Standard 109 was applicable and granted the government's motion for summary judgment (Pet. App. 22). The court of appeals unanimously affirmed without opinion (Pet. App. 24).

2. The court of appeals correctly affirmed the district court's judgment. There is no conflict of decisions, and further review is not warranted.

When Congress has committed the enforcement of a new statute to a specialized agency, the agency's interpretation is entitled to great deference. *Udall* v. *Tallman,* 380 U.S. 1, 16. Moreover, remedial legislation

such as the Safety Act "should be construed broadly to effectuate its purposes" (*Tcherepnin* v. *Knight*, 389 U.S. 332, 336), with exceptions being "narrowly construed." *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392. The administrative interpretation of a regulation is of controlling weight unless it is "plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414. These principles apply here and support the conclusion of both courts below that microsiped tires are properly regulated under Standard 109.

Petitioner erroneously contends (Pet. 10, 11 and 13) that microsiping—the alteration of the tread configuration of a tire by the addition of extra grooves—is not part of the manufacturing process, but is performed as a retail service on a customer's own tires after their first purchase, and therefore is not covered by the Safety Act and Standard 109. However it is characterized, the transaction in question here fell within the broad prohibition of 15 U.S.C. 1397(a)(1) that "no person shall—(1) manufacture for sale, sell, offer for sale, or introduce or deliver for introduction in interstate commerce" any motor vehicle equipment not in compliance with an applicable standard. Therefore, since Standard 109 applies to all new pneumatic passenger car tires (49 C.F.R. 571.109), the result reached by both courts below is correct.

Congress did not intend to have the safety purposes of the statute defeated or frustrated by an artificial separation of a single transaction into "purchase" and events immediately after purchase, which could re-

sult in the delivery of unsafe tires to consumers.[3] Rather, the specific language of the Safety Act and Standard 109 compels the conclusion that the responsibility of a manufacturer or seller under the Act encompasses structural modifications, such as microsiping, which he or his agent performs on the tire prior to its delivery to the first purchaser. Otherwise, persons selling motor vehicles or motor vehicle equipment could readily avoid the impact of Federal motor vehicle safety standards.[4]

Petitioner additionally contends (Pet. 14) that the construction placed on the Safety Act and Standard 109 by the courts below will result in the total abandonment of the microsiping process by small business operators. Petitioner's assertion is incorrect, since the holdings below forbid only the manufacture, sale or introduction in interstate commerce of noncomplying

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[3]The exception contained in 15 U.S.C. 1397(b)(1) should be construed narrowly (see *Arnold* v. *Ben Kanowsky, Inc., supra)* and has no application here. To hold otherwise would be to exalt the form of the transaction over its substance.

[4]Petitioner's reliance (Pet. 11-13) on *H & H Tire Co.* v. *United States Department of Transportation,* 471 F. 2d 350 (C.A. 7), is misplaced, and the corollary assertion that Standard 109 is neither reasonable nor practicable is erroneous. *H & H Tire* was not an enforcement action like the present case, but was a direct review action in the court of appeals under 15 U.S. C. 1394, in which the reasonableness and practicability of Standard 117 (dealing with retreaded tires) was directly in issue on the basis of the administrative rule-making record. The court there determined that, on the facts of that case, the record did not support the substantive provisions of Standard 117. In the instant case, there was no administrative record in evidence and petitioner neither directly contested the validity of Standard 109 nor offered any evidence to support the wholly speculative contentions made in the petition for a writ of certiorari that Standard 109 is not reasonable or practicable.

microsiped tires. There is no ban on the production or sale of microsiped tires that meet the requirements of Standard 109 and there is nothing in the record to support petitioner's speculative assertions that such production or sale is not practicable. [5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

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[5]Petitioner's claim (Pet. 2, 15) that a court must issue an opinion is frivolous. Courts of appeals "have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances." *Taylor* v. *McKeithen,* 407 U.S. 191, 194, n. 4. Moreover, rulings on motions for summary judgment are expressly exempted from the general requirement of findings. Fed. R. Civ. P. 52(a).

MAY 31 1974

MICHAEL RODAK, JR., CLERK

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PETITIONER'S REPLY MEMORANDUM

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May 30, 1974

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PETITIONER'S REPLY MEMORANDUM

In view of the misleading misstatements in respondent's "Memorandum in Opposition,"[1] this reply memorandum setting straight the record is felt to be warranted.

Respondent asserts:

> "Petitioner * * * has engaged in the practice of microsiping *its* tires" (p. 2)

The record shows:

> Petitioner never microsiped any of *its* tires but only the tires selected by customers who request the microsiping service.
>
> (Record: A. 58-59 deposition testimony.)

[1] All citations are to respondent's "Memorandum for the United States in Opposition" unless otherwise designated. All emphasis in quotations is ours.

Respondent asserts:

> "Subsequently, the government received an itemized invoice from petitioner containing a single charge covering the entire transaction." (p. 3)

The record shows:

4 tires	$ 59.24
4 tires	63.40
Microsipe 8 tires	32.00
Total excise taxes	18.16
Total cash price	$172.80

(Record: A. 28, Exhibit 1.)

Respondent asserts:

> "Petitioner admitted that these eight tires violated the standard."

The record shows:

> Respondent's testing lab reported only 4 tire failures (Record: S.A. 16); petitioner's expert only 1 and that unrelated to microsiping (Defendant's Reply Brief, Court of Appeals, p. 5). Solely to save jury-trial-battle-of-experts expense in time and money, petitioner suggested and respondent agreed to a stipulation liquidating damages to the sum of $4,000. (Record: A. 77.)

These misstatements of the record are critical for they go to the very heart of the matter:

Respondent would have this Court believe that its regulations extend to control the service of microsiping performed upon all passenger car tires whether belonging to the customer or the manufacturer at the time of microsiping on the argument that by the act of microsiping such tires were thereafter introduced into interstate commerce:

"* * * the transaction here in question fell within the broad prohibition of 15 USC 1397(a)(1) that 'no person shall * * * introduce or deliver for introduction in interstate commerce' any motor vehicle not in compliance with an applicable standard. Therefore since Standard 109 applies to all new pneumatic passenger car tires, the result reached by both courts below is correct." (p. 4)

Such was not the position of respondent in the courts below where respondent conceded that its regulation would not cover the situation in the case at bar if at the time of microsiping the tires belonged to the customer:

"QUESTION: When you have a clear service, clearly separated from the original sale, by an independent retailer, to recognize it for what it is, there is an inapplicability of the Act?

MISS RUBENSTEIN: Oh, yes, Your Honor, very definitely.

QUESTION: That would be subject to paragraph (b), is that right? Where it says 'shall not apply to the sale, the offer for sale, or the introduction' and so forth, 'after the first purchase . . . other than resale'.

MISS RUBENSTEIN: That's correct. That was the basis for my answer.

QUESTION: Well, there's really more there than that—there's no sale of the tires at all, by the microsiping.

MISS RUBENSTEIN: That's correct."

—Oral Argument of Miss Rubenstein on behalf of the Appellee — U.S. Court of Appeals for the District of Columbia Circuit — Transcript of Proceedings of Oral Argument on December 11, 1973 at p. 19.

Respondent would also have this Court believe that the principle here involved is not of sufficient importance to warrant review by this Court (p. 3, § 2; p. 6, n.5). Such was not the position of respondent in the courts below:

> "MISS RUBENSTEIN: * * * The issue that's presented here is significant because of its ramifications beyond the immediate circumstances of the microsiped tire question. If a tire standard is enforceable only against a manufacturer and not against dealers, it would follow that other standards regulating other items of equipment would also be enforceable only against the manufacturer.
>
> * * *
>
> Indeed, this case involves a vital proposition that it is unlawful to alter motor vehicle equipment after its certification but prior to its sale and delivery in the way that it does not conform with the regulation."
>
> —Oral Argument of Miss Rubenstein, *ibid*, at pp. 22-23.

We concur in the view that "this case involves a vital proposition," for the future of microsiping (and all such ancillary services) depends thereon, small business operators being unable to afford the financial burden of retesting and recertifying all tires after each microsiping, respondent's present argument before this Court (pp. 5-6) to the contrary notwithstanding.

We submit that for the future of all ancillary tire services performed at the retail level the writ of certiorari should issue.

Respectfully submitted,

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